BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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Summary*

The Commission should retain the general framework of the existing formula based on fully allocated costs with certain refinements, including a solution to the net salvage problem, a half-duct convention for conduit, the proposed conversion from Part 31 to Part 32 accounts, reconsideration of the safety space allocation and enhancements to the complaint process.

The Commission needs to adopt a solution to the problem of artificially low pole attachment rates caused by large negative net salvage reflected in the depreciation reserve for poles. Several LECs provide information showing the impact in their respective jurisdictions. In fact, this information indicates that there are 20 jurisdictions where net pole costs are negative or will be negative in the foreseeable future. This is a problem in jurisdictions where net pole cost is negative as well as in those where it is still positive.

Several commenters raise a variety of objections to any solution to the net salvage problem, including objections that are based upon a misunderstanding of the Pole Attachment Act, the scope of the problem or the Commission's depreciation practices. The Commission should reject these unfounded objections. For example, NCTA incorrectly alleges that the problem is the result of recent changes in LECs' depreciation accounting practices as they relate to negative net salvage, but there have been no such recent changes in the Commission's long-standing treatment of negative net salvage. Other commenters mistakenly believe that a utility has fully recovered its investment when net pole costs become negative, even though investment

* The abbreviations used in this Summary are defined in the body of these Reply Comments.

is nowhere near full recovery at that time. These commenters ignore that, under the Commission's depreciation rules, it is the combined recovery of original investment and negative net salvage that drives net pole costs to a negative figure long before the original investment is fully recovered.

To solve the net salvage problem, the Commission should adopt the gross book method because it is the easiest of the two methods described in the NPRM. Adoption of the gross book method does not result in over-recovery of costs, as alleged by some commenters. Instead, it eliminates the under-recovery caused by artificially low or negative net pole costs. Further, the gross book method is easier than the adjusted net book method because it does not require a calculation of the future net salvage component of the depreciation reserve. While the gross book method is easier, the adjusted net book method is also feasible because the net salvage component can be readily identified using theoretical reserve calculations.

Commenters, including one electric utility, generally opposed the Electric Utility White Paper's suggested changes in the pole height and usable space presumptions. There is insufficient data to require an increase in the pole height presumptions for purposes of telephone utility pole attachment rates. However, changes regarding the safety space do merit reconsideration, as discussed in SBC's Comments. Several utilities argue, on the same or similar basis as SBC, that the safety space should be considered nonusable. Even if the Commission is not persuaded that the safety space is nonusable, in whole are in part, SBC submits that as between electric and telephone utilities, the safety space should be considered electric utility space because the electric utilities do make some use of a portion of the safety space for ancillary attachments.

The Commission should adopt a half-duct convention for conduit because it is the method that best reflects the realities of the embedded base of average conduit. The Commission should reject flawed objections to a half-duct convention, such as arguments that ignore the actual average or typical condition of conduit and assume distorted hypothetical possibilities. The presumptions of the pole attachment formula should be based on averages, not on the maximum number of innerducts that theoretically could be crammed into the largest available duct. As reflected in certain comments, some refinements to the half-duct convention are needed, such as clarification that in the absence of innerduct, a half-duct rate cannot apply. Further, a spare maintenance duct that benefits all attachers and duct space that must be set aside for municipal use should not be counted as usable conduit space.

The Commission should adopt its proposed conversion of the administrative component from Part 31 to Part 32 accounts, over the objections of some commenters. A couple of commenters object that some expenses included in the numerator of the administrative component are not pole related. However, given that the administrative carrying charge is determined by the ratio of total administrative expenses to total plant investment, it is not proper to exclude certain categories of administrative expenses on the grounds that they are not pole related. Like-kind figures must be used in the numerator and denominator of this ratio. If, based on these objections, certain categories of administrative costs are excluded from the numerator, then equivalent exclusions should be applied to the denominator. Instead of undertaking the difficult task of mapping the Part 31 accounts to their Part 32 equivalents, the Commission should merely take a fresh look at the Part 32 accounts to determine which ones are of a general and administrative nature, as the Commission has proposed in the NPRM.

The Commission should adopt reasonable restrictions and requirements to minimize the burden of inconsequential, non-meritorious or hastily filed complaints. Also, to simplify the complaint process further, a 11.25% return component should be used across-the-board in all Section 224 pole attachment complaint proceedings, even if a state rate-of-return figure is available.

The Commission need not adopt special rules for nonstandard or unusual attachments or for nonrecurring charges. Such unique issues can be addressed initially through negotiation, or, if necessary, the complaint process. If they become more widespread, then the Commission can revisit the need for a generally applicable solution at that time.

SBC concurs with USTA that telephone utilities should be protected from excessive pole attachment rates. However, even if the Commission does not adopt USTA's suggestion to apply the pole attachment complaint process to all ILEC pole attachments, Section 224 provides ILECs some protection because, at a minimum, it applies to pole attachments by an ILEC outside of the area where it is the incumbent provider of telecommunications services. SBC urges the Commission to confirm that Section 224(a)(5) only excludes an ILEC from the definition of "telecommunications carrier" in the specific area where it is the incumbent provider.

WorldCom's suggestions of a "most favored nation" treatment of access rates and a rate publication requirement should be rejected as unnecessary. In addition, "most favored nation" treatment would be inconsistent with the provisions of Section 224 which contemplate and encourage negotiated agreements and preserve preexisting agreements.

Before the
Federal Communications Commission
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Amendment of Rules and	)	CS Docket No. 97-98
Policies Governing Pole	)	
Attachments	)	
	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC") hereby submits these Reply Comments on behalf of its subsidiaries, including Southwestern Bell Telephone Company ("SWBT"), Pacific Bell and Nevada Bell, in response to comments filed on June 27, 1997, pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1]

I. INTRODUCTION

The consensus among the commenters is that the Commission should adopt several of the proposed refinements to the formula, including a solution to the net salvage problem, a half-duct or other convention for conduit, the proposed conversion from Part 31 to Part 32 Accounts and a 11.25% return component. Most of the commenters, including an electric utility, oppose the suggested changes in the electric utility White Paper relating to pole height and usable space presumptions. Other commenters raise isolated issues that are not a concern to the majority, some of which are beyond the articulated scope of the NPRM. Although the majority voice is

[1] FCC 97-94, released March 14, 1997.

not always right, consensus indicates a willingness to cooperate with and facilitate the regulatory process. In any event, the Commission should weigh and closely examine the substance of all of the arguments, whether majority or minority, provided they are pertinent to the issues presented in the NPRM.

In asking a number of questions about the existing formula, the NPRM reflected a desire to continue using a formula based on historical, embedded costs. While the Commission should review and evaluate the comments that suggest an alternate approach, SBC recommends that the Commission largely retain the general framework of its existing formula with the modifications discussed below and in SBC's original Comments. The Telecommunications Act of 1996 (the "1996 Act") does not require the Commission to significantly modify its approach to pole attachment rates, except for Section 224(e)'s post-2001 formula for telecommunications carriers, and the Commission should not do so. However, the Commission does need to spruce up the existing formula, and adopt a method for conduit, before it makes the changes required to produce new methods under Section 224(e). Below, SBC addresses some of the areas that require sprucing up as well as suggestions in the comments that the Commission should reject.[2]

II. THE FORMULA NEEDS TO BE REVISED TO AVOID ARTIFICIALLY LOW RATES CAUSED BY THE NET SALVAGE PROBLEM.

A number of commenters recognize the need to resolve the problem of artificially low pole attachment rates caused by large negative net salvage reflected in the depreciation reserve

[2] Due to the large number of suggestions in the comments, SBC does not address all of them. SBC's failure to address a suggestion should not be construed as implying that SBC agrees with it.

for poles. Several local exchange carriers ("LECs") provide information concerning the impact in their respective jurisdictions. Altogether, the LECs that provided information about the scope of the problem identified over 20 jurisdictions where net pole costs are negative or will be negative in the foreseeable future.[3] Even in other jurisdictions where net pole costs do not become negative, the problem still exists because net pole costs are artificially reduced by the large net salvage amounts. There is also evidence of the severity of the problem in the information provided by some of the LECs. For example, in some jurisdictions, net pole cost is very low. In the case of U S WEST, net pole investment figures in Idaho, Montana, and Wyoming are $4.13, $0.51 and $2.57, respectively, compared to figures between $40 and $80 in other states where net pole costs are still positive. Similarly, in those states where Sprint's net pole investment is still positive, there are several which are especially low, including its operations in Indiana (11.17%), Minnesota (8.16%), and Texas (United - 1.28%; Central - 8.99%).[4] The magnitude of the impact is clearly significant, even in those jurisdictions where net pole costs are still positive.

Some of the telecommunications carriers and cable operators raise a variety of objections to the adoption of any solution to this problem. Others admit that there is a problem but contend that a correction to the formula is unnecessary or should be applied on a limited basis only when net pole costs become negative.[5]

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[3] Bell Atlantic/NYNEX at 3; GTE at 4; SBC at 11; Sprint, Exhibit 1; U S WEST at 5-6.

[4] Sprint at 13, Exhibit 1. Sprint states its net pole cost as a percentage of gross investment.

[5] See, e. g., Time Warner at 23.

AT&T is among those that raise objections to the adoption of any solution to this or any other inaccuracy in the formula. Generally, AT&T contends that the Commission should not adopt any "technical" modifications to the formula because (1) AT&T believes that these proposals are "anti-competitive, . . . self-serving and designed only to inflate pole attachment rates and create significant barriers to entry;"[6] and (2) AT&T believes that the Commission must not "ignore the existence of offsetting approximations."[7] Attacks on the motives of those arguing a position are irrelevant and do not present a sound basis for reaching the opposite conclusion. From a substantive standpoint, the offsetting factors are not sufficient to justify large rate reductions caused by the net salvage problem. Further, it would not be proper to refuse to remedy this problem on the theory that the formula only produces a rough approximation and AT&T's unproven assumption that the offsetting factors are approximately the same.

In a related point, AT&T contends that a remedy should be denied so long as the resulting rate is anywhere between the utility's incremental and fully allocated costs.[8] In order to satisfy this standard, it would be necessary to have two formulas, one to calculate the incremental cost and another to calculate the fully allocated cost and the workload associated with complaint would practically double. However, during the long history of the Pole

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[6] AT&T at iii.

[7] Id. at 11.

[8] Id. at 14-16. See also ALTS at 6.

Attachment Act, the Commission has always focused on the upper end of the statutory range.[9] Under these long-standing procedures, utilities have the right to charge the maximum rates permitted by the Pole Attachment Act. A different approach would be a drastic departure from precedent not contemplated in the NPRM.[10]

AT&T also contends that the net salvage problem and other problems with the formula should be handled via a waiver process. In the case of the net salvage problem, AT&T's preference for the waiver process is based upon its uninformed belief that the net salvage problem is not significant.[11] However, the comments reflect that the net salvage problem is much more widespread than AT&T believes, and this problem also extends to jurisdictions where net pole costs are still positive.

Some objections to a solution to the net salvage problem are based upon inaccurate understanding or characterization of depreciation practices. For example, the NCTA contends that negative net pole costs are the result of "an extremely aggressive accounting for 'negative net salvage.'"[12] NCTA explains this contention as follows:

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[9] See, e.g., Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, 2 FCC Rcd 4387 ¶¶53-77 (1987)("1987 Report and Order").

[10] See also, Alabama Power Company v. FCC, 773 F.2d 362, 366-67 (1985).

[11] AT&T at 14.

[12] NCTA at 21.

> Until relatively recently, standard depreciation practice was to amortize historic investment over the anticipated useful life of the pole, such as 1/40 years or 2.5%.[13]

On the contrary, there have been no recent changes in standard depreciation practices or in SWBT's approach to accounting for negative net salvage. The Commission has a long history of recognizing the need to recover negative net salvage and has awarded SWBT negative net salvage as far back as 1951, in SWBT's first depreciation represcription under the Communications Act.[14] NCTA also provides an unrealistic hypothetical, the gist of which is that a LEC could allegedly manipulate the Commission's depreciation process by overestimating environmental costs and retirement schedules. Based upon its own experience with the rigorous depreciation represcription process in which carriers present significant amounts of data regarding retirement and construction, the Commission should be able to summarily dismiss such implied criticisms of its process.

Consistent with its long-standing practice, the Commission authorizes pole depreciation in many jurisdictions that significantly exceeds the amount of the original investment. For example, the Commission's latest depreciation represcription for poles in Oklahoma was 258% of the original investment. Contrary to NCTA's (and other commenters) unfounded criticism of the Commission's depreciation procedures, such depreciation rates are neither the result of an aggressive accounting plan nor shortsighted mistakes by the Commission. The simple fact remains that costly salvage expenditures must be factored into the depreciation rate.

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[13] Id.

[14] Declaration of John P.Lube, Exhibit A to SBC Comments at 3 ¶ 2.03.

Another misunderstanding of the Commission's depreciation practices is reflected in commenters' statements indicating that they believe the utility has fully recovered its investment at the point when the net pole cost becomes negative.[15] As explained in detail in the Declaration of John P. Lube attached to SBC's Comments, this is absolutely false.[16] The NPRM included similar statements, which may have misled these other commenters concerning the time at which investment in poles would be fully recovered.

Other LEC commenters, including Ameritech and GTE, point out the obvious error in this assumption.[17] Citing the percentage of original pole investment that GTE has recovered in the states where its net pole costs is about to become negative, it says: "GTE will not have achieved a depreciation reserve position that is anywhere near a full cost recovery position at the time its pole net book values are estimated to become negative."[18]

The Commission's decision should be based on a clear understanding and description of its own depreciation practices. A decision influenced at all by commenters' mischaracterization of depreciation practices would be arbitrary and ill-advised.

III. THE EASIEST SOLUTION TO THE NET SALVAGE PROBLEM IS TO USE A GROSS BOOK METHOD.

A number of commenters support the use of a gross book method as the preferred

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[15] See, e.g., MCI at 15-19; NCTA at 22-23; Time Warner at 22 . See also AT&T at n.25.

[16] See Declaration of John P. Lube, at 3-4, ¶¶2.01-2.06; SBC at 5, 12-14.

[17] Ameritech at 2, n.3; GTE at 4-6.

[18] GTE at 6.

solution.[19] In explaining its reasons for favoring a gross book method, Sprint notes that this method "could be applied uniformly without having to determine special treatment where book value is negative."[20] Others, such as Bell Atlantic/NYNEX and GTE, are in favor of a gross book method because they agree with the NPRM's concern regarding the relative difficulty of extracting the net salvage from the depreciation reserve.[21] However, Sprint points out that "reliable salvage estimates can be calculated fairly easily."[22] SBC agrees with Sprint. As explained in the Declaration of John P. Lube attached to SBC's Comments, the net salvage component can be readily identified using theoretical reserve calculations.[23] However, despite the feasibility of using an adjusted net book method, the gross book method is still preferable because it does not introduce new calculations into the rate setting process, which could lead to additional future disputes concerning rates.

Only a few commenters raised specific objections to the use of the gross book method versus a net book method. These commenters echoed the NPRM's concern that using a gross book method would result in a higher rate.[24] However, as SBC demonstrated in its Comments, a

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[19] Bell Atlantic/NYNEX at 6-7; GTE at 7-9; Edison Electric Institute at 42-44; Ohio Edison at 24; Sprint at 8-9; USTA at 4-8.

[20] Sprint at ii, 8

[21] Bell Atlantic/NYNEX at 4; GTE at 7.

[22] Sprint at 9.

[23] Declaration of John P. Lube at 5-7, ¶¶3.04-3.10.

[24] See, e.g., AT&T at 16, n.27; MCI at 20 & Attachment 6; Time Warner at 24. See also NCTA at 24-25.

method that is primarily based upon gross book costs (i.e., for maintenance, administrative and depreciation elements) does not result in a higher rate compared to the adjusted net book method. SBC showed that the rates in SWBT's five states are lower using a gross book method.[25]

NCTA argues that use of a net, rather than gross, calculation "prevents utility over-recovery of actual amounts invested."[26] Actually, depreciation, which represents the recovery of actual amounts invested, is calculated on gross plant and the only difference under the gross book method is that the utility's depreciation rate will not be converted to a net figure by applying a ratio of gross to net investment.[27] Therefore, over-recovery of investment is not even an arguable possibility. AT&T is similarly concerned that under a gross book method, "the cost recovery process would be effectively reset to the beginning of the pole's life - - at least so far as maintenance, depreciation, and administrative costs are concerned - - the period when pole attachment rates are highest."[28] AT&T does focus on the three components that would be calculated on gross book costs, but its concerns are misplaced as shown in Exhibit "B" of SBC's Comments. SBC demonstrated that SWBT's depreciation and maintenance rates are virtually the same whether one uses net book or gross book costs. Therefore, the primary difference is in the administrative rate. As SBC explained, the flaw in the formula is focused primarily on the administrative component. In effect, attachers have received a credit or a very low rate for

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[25] See, SBC Comments, Exhibit B (showing rate calculations in SWBT's five states.)

[26] NCTA at 24-25.

[27] See NPRM n.63.

[28] AT&T at 16, n.27.

administrative costs due to the effect of net salvage.[29] Therefore, it makes sense to adopt a correction which properly identifies administrative costs and avoids further under-recovery of administrative costs on a prospective basis. In any event, there is no over-recovery as a result of a shift to a gross book method because the administrative component is calculated based upon figures for total plant, which is not affected noticeably by a large negative net salvage for poles.[30]

WorldCom claims that using the gross book method "would recover for the utilities more than their actual costs . . .."[31] On the contrary, there is no possibility that the utility would recover more than its actual, current costs. First, the ratio used to prorate administrative expenses to poles remains relatively constant as one moves from net to gross figures except to the extent that future net salvage affects the depreciation rate for poles more than total plant. Second, poles are depreciated more slowly than other plant. Therefore, any upward shift in the ratio used to prorate administrative expenses would be attributable primarily to the net salvage differential between poles and the remainder of the plant. Thus, conversion to the gross method should have a substantially similar impact on recovery of costs as removal of the net salvage using an adjusted net method. Further, as a result of the mandatory access and other detailed guidelines

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[29] SBC at 9-10 & Exhibit B.

[30] NCTA contends that "no steps are saved in an all-gross calculation" because net pole costs must still be calculated for purposes of the return element. NCTA at 25. However, SBC's gross book method is considerably simpler than the adjusted net book method because of the steps required to identify and remove the net salvage component. Under SBC's gross book method, it is not necessary to extract the net salvage for purposes of the return element. Consequently, there is no increase in the number of steps required by the gross book method compared to the existing unadjusted net book method.

[31] WorldCom at 24.

concerning access to poles and conduit adopted in the Local Competition Proceeding, CC Docket No. 96-98,[32] there is considerable upward pressure on current, actual administrative expenses relating to poles and conduit, which a formula based upon historical costs will fall far short of covering.

IV. THE COMMISSION SHOULD NOT CHANGE ITS POLE HEIGHT AND USABLE SPACE PRESUMPTIONS, EXCEPT FOR RECONSIDERATION OF THE SAFETY SPACE ALLOCATION.

Commenters generally oppose the Electric Utility White Paper's suggested changes in the pole height and usable space presumptions.[33] Even an electric utility, Consolidated Edison of New York, agrees that the White Paper has not provided sufficient evidence to justify increasing the 37.5 foot pole height presumption.[34] As evidence in support of retaining the existing presumption, Sprint and US WEST estimate that their average pole heights are 36.9 and 38 feet respectively.[35] Among other reasons for opposing any increase in average pole heights, commenters point out that to the extent there is an increase, it is attributable to increased demand for electric utility purposes.[36] To the extent that the Electric

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[32] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd 1544 ¶¶ 1119-1240 (1996)("Local Competition Order").

[33] Bell Atlantic/NYNEX at 10; Consolidated Edison New York at 12-14; GTE at 12-14; MCI at 3-4; Sprint at 5; Time Warner at 9-10; US West at 3-4; USTA at 22-29.

[34] Consolidated Edison New York at 12-14.

[35] Sprint n.13; US WEST at 4.

[36] See, e.g., Bell Atlantic/NYNEX at 10-11; MCI at 3-4; NCTA at 10 ("[T]he reason that pole heights are increasing is to allow electric utilities to send higher power loads along distribution routes into increasingly populated areas.").

Utilities sponsoring the White Paper have not shown that increased pole heights are due to carrier and cable TV demand, these taller poles should not be factored into the calculation of telephone utility pole attachment rates.

NCTA perceives the White Paper's claim regarding taller poles as an opportunity to increase usable space, and thus, to reduce the rate per attachment. However, NCTA likewise has not presented sufficient compelling data to require an increase in the pole height presumption. In fact, the specific data provided by NCTA is that three electric utilities' average pole heights in two states averaged about 40 feet.[37] Thus, NCTA has not furnished any evidence at all that telephone utility pole heights have increased. Therefore, if the Commission were to decide to increase average pole heights, it should only do so for purposes of the electric utility pole attachment formula.

Even the comments of the Electric Utilities sponsoring the White Paper do not provide any additional data demonstrating increased pole heights. While the over 150-page filing by these Electric Utilities contains detailed analysis of a variety of other issues, less than 2 pages are devoted to increased pole height.[38]

Although there is no reason to reconsider most of the pole height and usable space presumptions, changes regarding the safety space do merit reconsideration, as discussed in SBC's Comments.[39] Several utilities argue, on the same or similar basis as SBC, that the safety

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[37] NCTA at 10 and Exhibit 3.

[38] American Elec. Power Service Corp. *et al.* ("American Electric") at 48-49.

[39] SBC at 35-37.

space should be considered nonusable. In fact, some of the comments are in agreement with SBC that the original three reasons given by the Commission for treating the safety space as usable are no longer valid.[40] At a minimum, the Commission must reexamine these three original reasons in light of the significant developments identified by SBC and these other commenters.

Even if the Commission is not persuaded that the safety space is nonusable, in whole are in part, SBC submits that telephone and electric utilities are distinguishable because, electric utilities do make some use of a portion of the safety space for ancillary attachments, as the electric utilities themselves admit.[41] This use solely for electric transmission purposes should not be the basis for considering this to be usable space in the telephone pole attachment formula.

One additional consideration is that in its original examination of the safety space, the Commission only had to decide whether any portion of the safety space should be allocated to cable operators; it did not have to decide how that space was allocated between telephone and electric utilities. Now, however, the Pole Attachment Act may become applicable to agreements between telephone and electric utilities, and thus, the allocation of the safety space between the two becomes an issue the Commission will have to decide.[42] If part of the Commission's basis for ultimately deciding that the safety space should continue to be considered usable is that electric utilities place ancillary equipment in a portion of the safety space, then SBC submits

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[40] Duquesne at 22-27; Ohio Edison at 15-20; Union Electric at 24-29.

[41] Union Electric at 27-28.

[42] See Adoption of Rules For the Regulation of Cable Television Pole Attachment, CC Docket No. 78-144, 77 F.C.C. 2d 187, 190 ¶9 (1980).

that, as between electric and telephone utilities, the safety space should be considered electric utility space.[43]

V. A HALF-DUCT CONVENTION SHOULD BE USED FOR CONDUIT.

Several commenters support the NPRM's proposed half-duct convention.[44] Bell Atlantic and NYNEX concur with the NPRM's recognition that attempting to measure actual percentage of space occupied by the attacher's cable would be "difficult and contentious."[45] While GTE and Sprint generally support a half-duct convention, they recommend some refinements to this method. GTE points out that if an attachment precludes other attachments, then a full-duct rate applies.[46] Sprint believes that this method must recognize that Sprint operating companies (like other LECs) "do not pull a second cable through a duct already containing cable."[47] That is, absent innerduct, one cannot assume that it is feasible to install two cables in the same duct.

A few commenters urge the Commission to adopt a different occupancy presumption.[48] Generally, these commenters contend that, because it is sometimes possible to subdivide a 4-inch duct into 3 or 4 innerducts, the rate should be based upon this hypothetical future network

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[43] See, e.g., Bell Atlantic/NYNEX at 2.

[44] Ameritech at 7; Bell Atlantic/NYNEX at 12; GTE at 16; USTA at 20-22.

[45] Bell Atlantic/NYNEX at 12.

[46] GTE at 16.

[47] Sprint at 11. Accord, SBC at 28.

[48] AT&T at 22 (1/3-duct), MCI at 25 (3 ½ per duct); TCI at 16 (1/4-duct); Time Warner at 28 (3 or 4 per duct).

deployment.[49] Given that the formula is based upon averages, not hypothetical future deployment, it would be wrong to assume that all ducts are subdivided into 3 or 4 innerducts. By using a ½-duct convention, the Commission takes into consideration the actual circumstances of the average conduit and duct space. Aside from ignoring the concept of averages, these commenters incorrectly assume that all duct is 4 inches in diameter. On the contrary, the vast majority of SWBT's duct space is less than 4 inches in diameter and much of it is of a less-than-ideal quality of material. The typical duct is closer to 3 inches than 4 inches in diameter. With the outside diameter of a typical 1 1/4 inch innerduct measuring 1.64 inches, it is physically impossible to place 3 such innerducts in the typical 3-inch duct. Of course, in those instances where 1-inch innerduct has been placed, then 2 innerducts will fit in the 3-inch duct. The half-duct convention is much more closely aligned with real-world typical conduit installations than the 1/3- and 1/4-duct alternatives offered by commenters. The Commission should base its decision on the actual average or typical conditions, not on some distorted hypothetical possibilities or unrealistic and atypical assumptions.

As an example of the distorted logic of those seeking a 1/3 or 1/4-duct convention, consider AT&T's argument:

> The Commission has **long** recognized that multiple innerducts are usable in each conduit. Multimedia Cablevision ¶22 . . . A "one-third" approach is plainly appropriate. Virtually all conduit can support at least 3 (and often 4) innerducts - - each of which can contain one or more cables. In the Matter of AT&T Communications of the Southwest Inc.'s Petition For Arbitration of Unresolved Issues With Southwestern Bell Telephone Company

[49] AT&T at 22; MCI at 25.

> Pursuant to Sec. 252(b) of the Telecommunications Act of 1996, Docket No. 96-395-U, (Initial Testimony of James Hurst [*sic*] on Behalf of Southwestern Bell Telephone Company at p. 13, ¶6.07 (Arkansas PSC, filed Dec. 2, 1996). In fact, most of the conduit being deployed today can accommodate 4 inner-ducts. For that reason, at least one RBOC has been ordered to utilize a "one-third-duct" approach.[50]

There are several flaws in this analysis. First, when AT&T cites "¶6.07", it is probably referring to Section 6.07 of SWBT's standard Pole Attachment Agreement, which was filed with the Arkansas PSC, which does say that future innerduct will be installed in a manner that makes efficient use of space. Section 6.07 provides an example of efficient use as "typically 3 or 4 innerducts in a full 4-inch duct." The main flaw in AT&T's logic is that it has extrapolated from this single example of the most efficient use of the largest available duct to the entire embedded base of conduit. For one, AT&T assumes that all duct is 4 inches in diameter. Also, it assumes that the average duct contains 3 or 4 innerducts. Neither of these assumptions is at all accurate. The question is not what is the maximum number of innerducts that can be crammed into the largest available duct today and in the future; rather, it is what is the actual average number of innerducts in a typical duct. Because 3-inch duct is most prevalent in the embedded base, 3 or 4 innerducts are certainly not typical.[51]

Finally, AT&T assumes that because SWBT has been ordered to use a 1/3-duct method

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[50] AT&T at 22(emphasis added).

[51] See also SBC at 29-30 (discussing other factors that diminish the capability of subdividing duct space).

in one jurisdiction, that this method should become a nationwide standard.[52] However, to the extent that state determinations concerning pole attachment methods are relevant, SBC would point out that SWBT's use of a ½-duct method has been permitted in its other four states. Therefore, if the majority prevails, then so would the ½-duct method. Also, SWBT did not voluntarily agree to the 1/3-duct method in Oklahoma, but AT&T did voluntarily stipulate to a ½-duct method in Texas.[53]

The Commission should reject such flawed objections and adopt the half-duct method as the one that best reflects the realities of the embedded base of average conduit.

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[52] See AT&T at 22-23. AT&T's reliance on Oklahoma's 1/3-duct determination raises an issue concerning potential conflicts between state and federal jurisdiction over pole attachment disputes. Oklahoma has not certified that it is regulating pole attachments generally under Section 224(c), nor has it adopted rules implementing Oklahoma regulation over pole attachments generally. Instead, it has made a determination in connection with one arbitration proceeding. Others who may have complaints concerning use of utility conduit in Oklahoma may not be able to file complaints with the Oklahoma Corporation Commission("OCC"). Therefore, it is possible that both the Commission and the OCC will be asked to resolve disputes concerning pole and conduit rates in Oklahoma, and conflicting results are possible. Further, an attacher may file a complaint at the Commission and seek to use a unique state rate methodology that is inconsistent with the Commission's formula. The Commission should clarify its rules concerning state assumption of jurisdiction over pole attachments pursuant to Section 224(c) in order to avoid potential conflicts. For example, the Commission could clarify that a state may engage in partial "reverse preemption" of only poles or only conduit or only poles used by carriers and not cable operators, etc. Cf. NCTA at 6-7; SNET at 4-5; WorldCom at 7; TCI at 11, 14-15. See also Local Competition Order, ¶¶1232-1240 (discussing "reverse preemption" with respect to access).

[53] Stipulation on Poles, Ducts, Conduits and Rights-of-Way; Just and Reasonable Rates, filed in Texas PUC Docket No. 16226 (October 3, 1996)("$0.63/ft. per year for a full-size conduit, and $0.315/ft. per year for an inner-duct (i.e. half duct rate).")

VI. A SPARE MAINTENANCE DUCT THAT BENEFITS ALL ATTACHERS SHOULD BE EXCLUDED FROM USABLE CONDUIT SPACE.

There is little doubt that a maintenance spare is essential for emergency restoration and similar purposes. While SBC agrees that the spare maintenance duct must provide some benefit to attachers in order for it to be considered non-usable, it is not necessary for the Commission to create a "laundry list" of potential benefits that the spare duct may confer on attachers, as suggested by TCI.[54] All the Commission need require is that any benefits be equally available to the utility and attachers.

A few commenters object to any adjustment for a reserved maintenance duct.[55] Time Warner claims that there simply is no maintenance duct as a practical matter. This contention ignores the irrefutable benefit in having a spare duct for emergency as well as non-emergency repair and maintenance activities, as recognized by Multimedia Cablevision. MCI and AT&T claim that only an innerduct need be reserved. However, one innerduct may be insufficient, especially if the cable being replaced is copper or otherwise is sufficiently large to preclude the use of innerduct.

AT&T argues against the spare maintenance duct on the assumption that "[s]upporters of the half-duct alternative claim that only two inner-ducts are usable because one inner-duct must be reserved for maintenance or emergency needs."[56] AT&T does not identify the "supporters" it

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[54] TCI at 17-18.

[55] AT&T at 23; MCI at 26; Time Warner at 28.

[56] AT&T at 23.